No. 91-810

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

vs.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

May a court, in determining a reasonable attorney's fee award under Section 7002 of the Solid Waste Disposal Act, 42 U.S.C. Section 6972(e), or Section 505 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. Section 1365(d), enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all?

LIST OF PARTIES AND CORPORATIONS

CITY OF BURLINGTON,
a municipal corporation with no affiliation to any parent or subsidiary or related corporation,
Petitioner

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE
Respondents

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OPINIONS BELOW[1]

The opinion of the court of appeals (App. 1-37) is reported at 935 F.2d 1343. The opinion of the district court dated October 16, 1989 (App. 59-115) is reported at 732 F. Supp. 458. The opinion of the district court dated March

[1] Citations to the Joint Appendix filed with this brief are designated as "Jt. App. ___". Citations to the Appendix attached to the Petition for a Writ of Certiorari are designated as "App. ___".

15, 1990 (App. 118-129) is reported at 733 F. Supp. 23. The balance of the court of appeals and district court opinions and orders are not reported: Opinion and Order of United States District Court for the District of Vermont, March 26, 1986 (App. 44-53); Opinion and Order of Second Circuit Court of Appeals, August 20, 1986 (App. 142-144); Opinion and Order of the United States District Court for the District of Vermont, April 2, 1990 (App. 130-134); Order of the United States District Court for the District of Vermont, May 4, 1990 (Jt. App. 296-301); Judgment of United States District Court for the District of Vermont, May 7, 1990 (App. 116-117); Order of Second Circuit Court of Appeals, August 20, 1991 (App. 145-146); Order of United States District Court for the District of Vermont, October 11, 1991 (App. 137-138); and Order of Second Circuit Court of Appeals, October 25, 1991 (App. 38-39).

JURISDICTION

The opinion of the court of appeals was entered on June 12, 1991. A timely motion for reargument was denied on August 20, 1991. (App. 145). A petition for a writ of certiorari was timely filed on November 18, 1991. The petition was granted on January 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutes are set out verbatim in the Appendix:

Section 505 of Clean Water Act (33 U.S.C. § 1365). (App. 183).

Section 7002 of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6972). (App. 232).

STATEMENT OF CASE

Respondents own property adjacent to the City of Burlington municipal landfill. At the time Respondents filed their complaint, the City was operating its landfill pursuant to authority granted by the State of Vermont and subject to a state court order requiring the City to install a leachate collection system designed to prevent the migration of 90% of the leachate produced at the landfill, and a methane control system designed to prevent the migration of methane gas in explosive limits beyond the landfill boundary. In addition, the state court order required that the landfill cease waste acceptance and close on or before January 1, 1990.

Respondents' multi-count complaint included citizen suit actions brought pursuant to the Clean Water Act and the Resource Conservation and Recovery Act alleging violation of those Acts and seeking injunctive relief. The complaint also sought injunctive relief and damages in connection with various state law claims. The injunctive relief sought by Respondents included *inter alia*: (1) the

issuance of preliminary and permanent injunctions mandating immediate closure of the landfill, and cessation of unlawful discharges of hazardous and toxic pollutants; (2) an order requiring Petitioner to present to the court within 30 days a plan to excavate and properly dispose of hazardous wastes in the landfill and continued court supervision of the implementation of any court-ordered remedial action; (3) an order prohibiting any alteration of the landfill without the approval of a court-appointed monitor to be paid for by Petitioner; (4) an order requiring the City to present to the court within 30 days a plan to purge hazardous and toxic materials from groundwater and surface water beneath and adjacent to the landfill and to implement any approved plan under the supervision of the court; (5) an order requiring the City to install and operate a leachate collection drain system; (6) an order requiring presentation to the court within 30 days of a methane gas control and abatement plan, and installation of any such approved system under the court's supervision; (7) an order requiring the City to report monthly to the court-appointed monitor; (8) an order requiring the City to post a bond or other equivalent security; (9) imposition of civil penalties; and (10) an award of attorney's and expert witness fees (see Complaint, App. 244, 267-69).

Shortly after the complaint was filed, hearings on the motion for a preliminary injunction were commenced before the United States Magistrate. Subsequently, the court issued an order on March 26, 1986, denying the Respondents' motion for a preliminary injunction. (App. 40-53).

Respondents unsuccessfully appealed the denial of their motion for a preliminary injunction to the Second Circuit Court of Appeals. (App. 142-144).

Thereafter, the trial court severed Respondents' actions seeking injunctive relief, including the claim based upon state law, for a bench trial. The district court heard the motion for a permanent injunction during May of 1989 and issued its opinion on October 16, 1989. (App. 115). The opinion includes findings that the City was in violation of certain provisions of the Clean Water Act and the Resource Conservation and Recovery Act and Vermont's Groundwater Protection Act. The court also found that a closure date of January 1, 1990 was established under an existing state court order (App. 63-64); that the state considered the January 1, 1990 closing date appropriate (App. 65); and that the state intended to enforce the state court order requiring closure on that date. (App. 65). The district court then issued an order requiring that the landfill be closed on January 1, 1990, the same date fixed by the state court order. Otherwise, the court did not grant Respondents any of the injunctive relief which they sought. Nevertheless, the same opinion concluded that the Respondents had "substantially prevailed in both their RCRA and CWA claims" and ordered the City to pay costs of litigation, "including reasonable attorney and expert witness fees to be assessed." (App. 88-89).

Respondents then filed an application for attorney fees seeking a lodestar fee of $198,027.50 based upon 3185.4 hours of attorney and paralegal time at various

hourly rates ranging from $30 to $125 per hour, (Jt.App. 10) which Respondents represented were "reasonable". (Jt.App. 5-6) Respondents also sought a 100% enhancement of the lodestar. (See Memorandum of Respondents (Jt.App. 1-11, 14)).

Petitioner opposed the award of attorney fees on the grounds that Respondents had not substantially prevailed in light of the fact that the judgment issued by the court did nothing more than approve a closing date for the landfill which had been established prior to initiation of the action, and did not otherwise grant Respondents any of the relief sought by their litigation. (See Memorandum of Petitioner, (Jt.App. 219-226)).

Petitioner did not contest that the hourly rates proposed by the Respondents were reasonable. Rather, the City contended that the Respondents' lack of success in the litigation required that all time associated with those claims for relief on which the Respondents did not succeed be eliminated from the lodestar calculation and that the properly computed lodestar be reduced to reflect the Respondents' very limited success to the extent they could be said to have prevailed. (See Memorandum of Petitioner (Jt.App. 219-226)).

The district court thereafter issued its opinion of April 2, 1990 in which it found that the hourly rates proposed by Respondents were reasonable. It also found that the number of hours expended were "reasonable in connection with this complex action" and awarded a lodestar fee of $198,027.50 as requested by Respondents (App. 130-134).

Without commenting upon the results obtained or discussing how it had considered the relationship between the amount of the lodestar fee and the results obtained by Respondents in the litigation, the district court awarded Respondents a 25% risk/contingency enhancement ($49,506.87) based on conclusions that: (1) "Plaintiffs' attorneys would not have been compensated at all unless plaintiffs prevailed"; (2) the risk of not prevailing was substantial; (3) plaintiffs did not ultimately prevail until after trial; and (4) without the opportunity for enhancement, plaintiffs would have faced substantial difficulty obtaining counsel of reasonable skill and competence in this complicated field of law. (App. 130-174).

On May 7, 1990 the court entered judgment with respect to the federal law actions. (App. 116-117). The judgment required the closure of the landfill on or before January 1, 1990. It specifically denied the imposition of civil penalties and was silent with respect to all other relief requested by the complaint, except that it ordered payment of the lodestar fee, expenses, and the enhancement award set forth in its opinion of April 2, 1991.

The judgment of the trial court was appealed on several grounds, including the award of attorney fees in the lodestar amount and the award of enhancement. The Second Circuit affirmed the trial court's judgment in all respects. (App. 1-37). In particular, it determined that no reduction in the lodestar was appropriate because the case was complex. (App. 33). The appellate court did not attempt to relate the amount of the lodestar to the degree of success obtained, saying only that the district court

"did not err by rejecting the city's efforts to trivialize the plaintiffs' success." (App. 34).

The Second Circuit also upheld the 25% enhancement, holding that enhancement of the lodestar was appropriate if "without the possibility of fee enhancement . . . competent counsel might refuse to represent clients thereby denying them effective access to the court." (App. 34-37).

On June 25, 1991 Respondents filed a supplemental application for an award of attorney fees with the district court covering work performed after the date covered by its initial application. Respondents' sought a lodestar fee of $24,113, a 25% enhancement of $6,028.25, and expenses of $2,707.61. (Jt.App. 311-312). That application was granted by the district court on October 11, 1991. (App. 137-138).

Finally, Respondents filed an application with the court of appeals for work connected with the appeal to that court, seeking a lodestar fee of $53,315.00, an enhancement of $13,328.75 and expenses of $2,240.34. (Jt.App. 362-363). On October 25, 1991 the Second Circuit granted the motion to the extent of the requested lodestar and expenses, but denied the request for "risk enhancement" holding that the "risk" involved in defending on appeal is "not significant" and "in the circumstances of this case calls for no enhancement to the lodestar amount." (App. 38-39).

SUMMARY OF ARGUMENT

The attorney fee provisions of the Clean Water Act, 32 U.S.C. § 1365(d) and the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), as well as the legislative history of federal fee shifting statutes in general, allow the award of *reasonable* attorney's fees to prevailing plaintiffs. The intent of the statutes is to provide for an award in an amount no more than is sufficient to attract competent counsel. Nothing in the statutes or the legislative history authorizes a separate award of attorney's fees in addition to a properly computed lodestar fee to compensate plaintiffs' counsel for taking the case on a contingent fee basis.

Jurisprudence developed by this Court respecting the award of statutory attorney's fees, including the adoption of a particular lodestar method of determining reasonable fee awards, militates against an enhancement of the lodestar fee to reflect a contingency risk of loss. The lodestar method of fee determination requires the district court to follow a two-step process in determining a reasonable fee. The first step requires the trial court objectively to determine a reasonable hourly rate, based upon evidence of market rates presented to it, sufficient to attract competent counsel to perform the work involved. The determination of a reasonable hourly rate subsumes any contingency risk of loss factor which might affect the market rate. The court must also determine from evidence presented the number of hours reasonably expended on the case. The lodestar fee – the product of all hours reasonably expended multiplied by the reasonable hourly rate – represents the maximum reasonable fee in all cases where essentially complete relief is obtained; but such an award is excessive where the relief obtained

is limited in relation to the relief requested and scope of the litigation as a whole. Step two of the lodestar method, therefore, requires that the lodestar fee be reduced where limited relief is obtained. Step two may not be avoided and is essential to assure that an award of fees is reasonable under the circumstances of the case.

The principles underlying the lodestar method will not logically admit of an enhancement for risk of loss contingency since any enhancement would, by definition, constitute a windfall to plaintiffs' counsel.

Use of a risk of loss contingency enhancement is inconsistent with the primary objective of the lodestar method, which was formulated by this Court to consider all relevant factors in awarding fees, while at the same time avoiding arbitrary and inconsistent results. It also demeans the judicial process and the integrity of the courts, since its application requires that the trial court make inconsistent findings.

Even if enhancement of the lodestar amount to reflect risk of loss contingency were compatible with logic and the lodestar method of fee determination, it should be rejected as a matter of policy because any such enhancement is necessarily arbitrary, results in a defendant paying plaintiffs' counsel for losing efforts, and involves the courts in policy assessments which are properly a question for Congress to resolve.

Finally, the results of this litigation, far from justifying an enhancement of the lodestar amount, in fact,

demand its reduction. The relief obtained by Respondents was so limited in comparison to the relief requested and the scope of the litigation that both the trial court and the Second Circuit Court of Appeals erred in not reducing the lodestar amount to reflect Respondents' limited success.

ARGUMENT

1. The Statutes And Relevant Legislative History Do Not Authorize A Separate Award Of Attorney's Fees To Reflect A Contingency Risk Of Loss.

Each of the statutes under which attorney's fees were awarded in this case provides that the district court "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." The statutes provide only that any award of fees must be reasonable. Otherwise, they provide no guidance with respect to what amount of attorney's fees may be awarded in a particular case.

Although the legislative history of these statutes offers no guidance with respect to the issue of what amount constitutes a reasonable fee or what factors the courts should consider in determining a reasonable fee, recourse is often taken to the legislative history of the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. That history is contained primarily in the House and Senate Reports which accompany the Act, H.R. Rep. No. 94-1558 (1976) and S. Rep. No. 94-1011 (1976). Both reports cite *Johnson v. Georgia Highway Express, Inc.*, 488

F.2d 714 (5th Cir. 1974), a case which sets out twelve factors[2] governing the amount of attorney's fee awards.

Of the criteria identified, only one – "whether the fee is fixed or contingent" – refers to contingency. But when the text of the *Johnson* opinion relating to that factor is read, it is apparent that the reference to the fee being contingent has nothing to do with the risk that a statutory fee will not be awarded. Instead, that section of the opinion makes clear that what was intended was a reference to the existence of any fee agreement with the client, be it fixed or contingent. The *Johnson* court reasoned that any such agreement would fix a ceiling for any statutory fee award. *Id.* at 718.[3]

The *Johnson* case itself, therefore, does not stand for nor even suggest the proposition that a contingency risk of nonpayment should be the subject of a separate award. Nor does the decision state that a court should consider

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[2] The twelve *Johnson* factors are: 1. the time and labor required; 2. the novelty and difficulty of the questions; 3. the skill requisite to perform the legal service properly; 4. the preclusion of other employment by the attorney due to acceptance of the case; 5. the customary fee; 6. whether the fee is fixed or contingent; 7. time limitations imposed by the client or the circumstances; 8. the amount involved and the results obtained; 9. the experience, reputation, and ability of the attorneys; 10. the undesirability of the case; 11. the nature and length of the professional relationship with the client; and 12. awards in similar cases.

[3] This position has since been rejected by this Court in *Blanchard v. Bergeron*, 489 U.S. 87, 92-93 (1989) (the *Johnson* contingency fee factor is just a factor and is not dispositive.)

the contingency risk that no statutory award will be made in determining a statutory award of fees.

The Senate Report, but not the House Report, also cites three cases which it concluded "correctly applied" the *Johnson* factors so that the resulting fee awards were "adequate to attract competent counsel," but were not "windfalls to attorneys." S. Rep. No. 94-1011, p. 6 (1976).

One of the cases cited, *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) awarded an enhancement for contingency, quality of the attorney's work, and results obtained, but the "lodestar" amount in that case was computed using an "average" hourly rate, as contrasted with a "reasonable" or "market" hourly rate.

The second case cited in the Senate Report as correctly applying the *Johnson* standards is *Davis v. County of Los Angeles*, 8 E.P.D. ¶9444 (C.D. Cal. 1974). That case awarded an enhancement to a lodestar, apparently also calculated with reference to "normal hourly rates," but the enhancement was premised upon "the excellent results obtained" and the fact that the case was "difficult to litigate." The *Davis* opinion did not reference a contingency risk of loss factor.

In the third cited case, *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975), the court, despite the excellent results obtained by the litigation, reduced a fee request of $204,237.50 which the court specifically found was reasonable, to a lower amount of $175,000 also determined by the court to be reasonable. The opinion refers to the *Johnson* factor of whether there was a fee contract, notes that there was no evidence of a fixed fee agreement, but holds that under the statute

reasonable fees should be determined by the court and awarded without reference to any fee agreement.

Given the divergence of the rationale and results reflected in the three cases cited by the Senate Report, no conclusion may be reached as to what the Senate intended by its reference to those cases. Furthermore, since the House Report does not refer to any of those cases it is questionable whether any significance can be placed on their citation by the Senate Report.

What is clear from the legislative history is that Congress considered a reasonable fee to be one sufficient to attract competent counsel, but no more; that the courts are directed to employ the factors set forth in *Johnson, supra,* in making reasonable fee awards; that attorney's fees should reflect time *reasonably* expended on a matter; and that fee awards should not be reduced simply because the relief sought is non-pecuniary in nature. Nothing in the statutes or the legislative history, however, instructs the courts how to apply the *Johnson* factors so as to convert them to dollars in a reasonable fee award.

2. The Jurisprudence Of This Court Relating To Attorney's Fee Awards Militates Against Risk Of Loss Enhancement Of The Lodestar Fee.

It was in light of the fact that neither the fee statutes nor the *Johnson* approach provide any framework in which to apply the various factors that this Court adopted the lodestar approach set out in *Hensley v. Eckerhart,* 461 U.S. 424 (1983). The *Hensley* lodestar method envisions a two-step process. In the first step, a

"lodestar" fee – defined as the product of all hours reasonably expended on the litigation, multiplied by a reasonable hourly rate – is determined. In the second step, the trial court is required to determine whether the lodestar fee should be adjusted upward or downward so as to properly reflect "reasonableness." The *Hensley* opinion establishes that the step two adjustment must reflect the *Johnson* "result obtained" factor, *Hensley, supra* at 434, and might reflect other *Johnson* factors to the extent they are not subsumed within the basic lodestar calculation. *Hensley, supra* at 434, n.9. The Court was unanimous with respect to the importance of the trial court's consideration of the results obtained factor. The majority opinion observed that the "important factor of the results obtained" is "particularly crucial where a plaintiff is deemed prevailing even though he succeeded on only some of his claims for relief," *Hensley, supra* at 434; that the "result is what matters," *id.* at 435; that "the most critical factor is the degree of success obtained," *id.* at 436; and that "the extent of plaintiffs' success is a crucial factor in determining the proper amount of an award of attorney's fees," *id.* at 440. The concurring portion of the opinion of Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, agreed with the Court's holding that "the extent of the plaintiffs' success is a crucial factor in determining the amount of a fee award," *id.* at 441, and went on to observe that:

> Any system for awarding attorney's fees that did not take account of the relationship between results and fees would fail to accomplish Congress' goal of checking insubstantial litigation.

Id. at 448.

Noting that the fact that a plaintiff achieved "prevailing party" status "may say little about whether the expenditures of counsel's time was reasonable in relation to the success achieved," *id.* at 436, the *Hensley* opinion required that "when an adjustment to the lodestar is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." *Id.* at 437. The opinion then held that a reduction from the lodestar fee "is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole" and "where the plaintiff achieved only limited success the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440.

The lodestar concept adopted in *Hensley* was prompted by the Court's perception that the *Johnson* approach, because it provided no framework for application of the fee-shifting factors and placed unlimited discretion in trial judges, led to arbitrary and disparate results. *Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air*, 478 U.S. 546, 562-64 (1986) (*"Delaware Valley I"*). In its decisions since *Hensley*, this Court has increasingly emphasized that the basic lodestar fee usually defines the upper limit of a reasonable fee award.

Blum v. Stenson, 465 U.S. 886 (1984) thus observed that the lodestar fee is presumptively the "reasonable fee," *id.* at 897 and held that "novelty" and "complexity of the issues," the "special skill and experience of counsel," and "quality of representation" and the "results obtained" from the litigation were all subsumed in the

lodestar calculation and could not serve as a basis for increasing the lodestar amount. *Id.* at 898-900.

In *Delaware Valley I*, this Court, observing that fee shifting statutes were not designed "to provide economic relief" to attorneys or "to replicate exactly the fee an attorney could earn through a private fee arrangement," characterized the lodestar figure as being strongly presumptive of a reasonable fee, which could be adjusted upward only in rare and exceptional cases. *Id.* at 565.

Finally, in *Blanchard v. Bergeron*, 489 U.S. 87 (1989) the Court indicated that lodestar fee awards, "properly calculated, *by definition* will represent the reasonable worth of services" and protect against windfall awards. *Id.* at 96. (Emphasis added).

3. A Contingency Risk Of Loss Factor Is Subsumed In The Determination Of A Reasonable Hourly Rate And May Not Serve As A Basis For Enhancing The Lodestar Amount.

The award of an attorney's fee under fee-shifting statutes is always contingent upon the attainment of "prevailing party" status. The presentation-and selection of a reasonable hourly rate for use in a lodestar calculation is made in light of that known contingency. The amount of a reasonable hourly rate is determined by reference to the prevailing market rate in the relevant community and "the burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line

with those prevailing in the community for *similar services* by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895 and n.11 (emphasis added).

Assessment of the contingency factor is an integral part of the selection of a reasonable hourly rate during step one of the *Hensley* calculus. This is consistent with the Court's objective of reducing the opportunity for arbitrary results when it adopted the *Hensley* approach. The resulting lodestar figure therefore necessarily reflects contingency considerations. Any enhancement of the lodestar based on contingent risk of loss, then, is inherently duplicative.

Contrary to the concerns expressed in the concurring and dissenting opinions in *Delaware Valley II*, 483 U.S. at 711, 730, 735, prohibiting enhancement of a lodestar fee does not foreclose consideration of contingency in setting a reasonable attorney's fee. Instead, the prohibition results from the fact that the lodestar calculation already reflects consideration of contingency. The contingency factor cannot serve as an independent basis for enhancing the fee award. *Hensley*, 461 U.S. at 434, n.9; *Blum*, 465 U.S. at 898-900; *Delaware Valley I*, 478 U.S. at 565.

4. Contingency Risk Of Loss Enhancements Of The Lodestar Amount Cannot Be Justified.

The presumption that compensation at a reasonable hourly rate for all hours worked will be sufficient to

attract competent counsel is basic to fee-shifting statutes. Without that presumption, there is no means by which trial courts can make reasoned decisions respecting the proper amount of an attorney's fee award, nor is there any means by which appellate courts can review decisions of the lower courts to enforce the statutory requirement that fee awards be reasonable. Taking the presumption as valid, the enhancement of a lodestar amount computed, as it was in this case, by multiplying all hours claimed to have been expended on litigation by the reasonable hourly rate proposed by Respondents, is not logically supportable. Such a lodestar figure, by definition, represents the maximum reasonable fee which could be awarded under the fee-shifting statutes.

If a fee in excess of the lodestar is awarded, one of two unavoidable conclusions must be drawn – either the attorneys receiving such a fee are being compensated for more hours that they expended on the matter or they are being compensated at larger than reasonable hourly rate. Either result constitutes a windfall, measured by the amount of the enhancement, and represents an abuse of discretion on the part of the court making the award.

As this case illustrates, a correctly computed lodestar amount is more than presumptively indicative of a reasonable attorney's fee. It is the definitive maximum reasonable fee which can be awarded under the fee-shifting statutes.

In its prior decisions on the subject, this Court has made passing reference to the possible circumstances which might justify enhancement of a correctly computed lodestar. Thus, in *Hensley*, the Court held "there remain

other considerations that may lead the district court to adjust the [lodestar] fee upward or downward, including the important factor of "results obtained." 461 U.S. at 434. The Court identified other *Johnson* factors which were not subsumed in the lodestar calculation as possible bases for such adjustments, *id.* at 434, n. 9, and provided that "in some cases of exceptional success, an enhanced award may be justified." In *Blum*, the Court refused to rule out the possibility of an upward adjustment of the lodestar, saying "there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is unreasonably low or unreasonably high." 465 U.S. at 897. The opinion proceeded, however, to hold that the crucial "results obtained" factor would normally not provide an independent basis for *increasing* the fee award. *Id.* at 900. In its most recent decision, the Court observed only that (1) the courts may . . . adjust [the] lodestar calculation by other factors," *Blanchard*, 489 U.S. at 94, but that the lodestar approach was the "centerpiece of attorney's fees awards."

Despite the Court's apparent reluctance to abandon enhancement, it is simply inconceivable that any adjustment factor or combination of factors could ever justify a fee award in excess of a correctly calculated lodestar. No amount of success in obtaining relief would justify a court compensating Respondents' counsel for hours that were not expended or at an excessive hourly rate.

5. The Failure Of The District Court And The Court Of Appeals To Comply With Requirements Set Forth In *Hensley v. Eckerhart* With Respect To The Award Of Attorney's Fees Was Erroneous And Constitutes An Abuse Of Discretion.

For reasons set forth earlier in this brief, the Second Circuit approach to the enhancement fee awards must be rejected. The Circuit's method, followed by the trial court in this case is set forth in *Lewis v. Coughlin*, 801 F.2d 570 (2d Cir. 1986). The trial court is instructed to look to the time that counsel agreed to take the case on a contingency basis and determines if, at that time, competent counsel would have perceived that there was a significant risk of not prevailing and, if so, *might* have refused to accept the case without the *possibility* of fee enhancement. *Lewis*, 801 F.2d at 576. If the answer is in the affirmative, the court may, in its discretion, increase the lodestar fee by whatever amount the court, in its unfettered discretion, deems necessary to bring the fee to the minimal amount necessary to attract competent counsel.

All that a prevailing plaintiff must show, therefore, to be entitled to an enhancement is the existence of a contingent fee arrangement, an averment by counsel that there was a significant risk of not prevailing, and an assertion that competent counsel would not accept the case under those conditions. Not surprisingly, affidavits of counsel in this case to that effect were forthcoming. *See*, Affidavit of Richard Bland (Jt.App. 18-24) (stating that all work associated with the statutory liability claims was taken on a contingent basis and opining that without the opportunity for enhancement, Respondents "would have faced extreme difficulty in finding other counsel of similar

experience to pursue their claims . . . on an hourly rate to be paid only on the contingency of success"); Affidavit of William W. Pearson (Jt.App. 25-28) (opining that applicable laws are complex, technical issues, are sophisticated, and defendant is a political subdivision which does not function or have priorities like a private sector party, thereby increasing the uncertainty of strategy and outcome).[3]

The trial court awarded Respondents attorney's fees of $198,027.50, expenses of $10,929.66 and a 25% risk/contingency enhancement of $49,506.87 on findings that Respondents' attorneys would not have been compensated unless Respondents prevailed, that the risk of not prevailing was substantial as evidenced by the court's denial of the preliminary injunction motion and the fact that Respondents did not ultimately prevail until after trial, and that Respondents would have faced substantial difficulty obtaining competent counsel without the opportunity for enhancement. (App. 133). The court also found that no rare or exceptional circumstances existed, (App. 131), and made no findings as to whether the Respondents' success was exceptional or if the relief

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[3] It is instructive to note that while Mr. Bland's affidavit indicates that the "opportunity" for enhancement was an important factor in his firm's decision to pursue the statutory claims, his affidavit also indicates that he was still in law school in April, 1985, when Respondents became Mr. Pearson's clients. Mr. Pearson said nothing in his affidavit about an opportunity for enhancement as motivating his decision to take the case.

obtained was limited with respect to the litigation as a whole, other than its conclusion that the expenditure of all hours claimed by Respondents' counsel was reasonable because the litigation was complex. (App. 130).

Following the initial award of attorney's fees, the district court, by reference to its previous findings, granted Respondents' Supplemental Application for Fees in the amount of $24,113, expenses in the amount of $2,707.61 and a 25% enhancement of the fees, or $6,028.25 (App. 132). The district court offered no explanation for its decision applying a 25% enhancement.

The Second Circuit Court subsequently granted Respondents' application for fees (Jt.App. 356) in the amount of $53,315 for work associated with the appeal to that court together with $2,240.34 in expenses, but denied their request for a 25% risk enhancement, holding that "the risk" involved in defending on appeal is not significant and, in the circumstances of this case, called for no enhancement. (App. 38-39).

The Second Circuit contingency risk of loss approach to enhancement of the lodestar amount specifically rejects the *Hensley/Blum* requirement that enhancement of the lodestar fee is justified only in cases of exceptional success. *See, e.g., Lewis*, 801 F.2d at 576 ("The district court need not find the results achieved 'exceptional' within the meaning of *Blum*.").

The failure of the district court and the Second Circuit Court of Appeals to consider the relationship between the amount of the fee awarded and the results obtained, *Hensley*, 461 U.S. at 437, their failure to include

in their opinions and orders an explanation of their consideration of the relationship between the amount of the fees awarded and the results obtained, *id.* at 437, and their failure to reduce the lodestar award, as more fully explained in the following section of this brief, all constitute abuses of discretion and require reversal of those awards.

6. The Results Obtained In This Case Are Not Exceptional And Do Not Justify An Increased Fee. The Results Obtained Are, In Fact, So Limited As To Require A Reduction Of The Lodestar Amount.

The awards of attorney's fees made by the district court and the Second Circuit underscore the importance of this Court's holding in *Hensley*, 461 U.S. 424, emphasizing the importance of the "results obtained" justification for any adjustment of the lodestar amount, and requiring that any enhancement be justified by a finding of exceptional success. *Id.* at 435. No enhancement should occur if comparison of the results obtained in the litigation to the lodestar amount indicates that the "prevailing" party enjoyed limited success. This case exemplifies that situation and underscores the importance of the second step in the *Hensley* lodestar approach, a step which both courts below wholly ignored.

The relief sought by Respondents in this case was extensive. See Complaint, App. 244, 267-69. When faced with the complaint, the City was forced to determine whether the public interest justified the expenditure of public funds and the incurrence of other costs which

compliance with the demanded relief would entail. Having concluded that the public interest did not justify those costs, the City defended against the imposition of the relief sought by the Respondents, seeking to preserve its rights under an existing state court order to operate its landfill until January 1, 1990 and to otherwise continue with its planned operations of the landfill. A review of the orders and judgment issued by the district court reveals that the City was entirely successful – none of the relief sought by the Respondents was granted.[4] The status quo ante did not change as a result of the Respondents' complaint or the litigation that followed.

Neither the district court nor the court of appeals considered the relationship of the lodestar to the results obtained in this litigation. Under no reasonable standard could a court, given the facts of this case, conclude that Respondents achieved exceptional success or even excellent results justifying a fully compensatory lodestar award. There should be no enhancement for risk of loss contingency or on any other basis. It is submitted instead that a significant downward adjustment of the lodestar is

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[4] The judgment entered in this matter requiring closure of the landfill on January 1, 1990, should not be misconstrued. The Respondents sought immediate closure of the landfill. As indicated above, the ordered closure date was the same date that had been set for closure prior to the filing of the complaint. The "relief" reflected in the judgment is an indication of the City's position in the litigation, not any success on the part of the Respondents.

required if, indeed, the results obtained in this litigation can justify any award of attorney's fees at all.[5]

CONCLUSION

For the reasons advanced in this brief, Petitioner respectfully submits that this Court should reverse the decision of the Second Circuit Court of Appeals with respect to the award of both the lodestar fees and enhancement thereof and remand this case to the district court for determination of an award of reasonable attorney's fees, if any, consistent with this Court's holdings in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Respectfully submitted,

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March 12, 1992

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[5] See *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1986) (A prevailing plaintiff " 'should ordinarily recover an attorney's fee unless special circumstances would render an award unjust.' " (quoting S. Rep. No. 94-1011, p. 4 (1976) quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).